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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

Nos. 387 and 641

PHELPS DODGE CORPORATION, *Petitioner,* *vs.* NATIONAL LABOR RELATIONS BOARD, *Respondent.*	No. 387
NATIONAL LABOR RELATIONS BOARD, *Petitioner,* *vs.* PHELPS DODGE CORPORATION, *Respondent.*	No. 641

BRIEF FOR PHELPS DODGE CORPORATION

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Jurisdiction

These cases come before the Court on writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted on January 13, 1941 (— U. S. —, 85 L. Ed. 390), for the purpose of reviewing certain portions of a decree of the said Circuit Court of Appeals enforcing, modifying and setting aside, in part, an order of the National Labor Relations Board (R. 930, 933). The opinion of the court below is reported in 113 Fed. (2) 202 (R. 923, 930). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code (43 Stat. 938; 28 U. S. C. A., Sec. 347).

Form of Brief and Explanation of References

Pursuant to a stipulation between the parties to these cases each is filing a single brief containing the arguments in favor of the propositions presented in its petition for certiorari and against the propositions presented in the petition of the other party. As hereinafter used the word "Company" refers to Phelps Dodge Corporation, the word "Board" refers to the National Labor Relations Board, the term "lower court" refers to the United States Circuit Court of Appeals for the Second Circuit, and the word "Act" refers to the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 429, 29 U. S. C. A., Sec. 151 et seq.).

Statement of the Case

(a) *History*

The Company and its subsidiaries are principally engaged in the mining, milling, smelting, refining and fabricating of copper and in the marketing of finished copper products. These operations are extensive and occur in several states (R. 614, 620). No contention is made that the Company's business is not within the jurisdiction of the Board.

For many years the Company has been engaged in the mining of mineral bearing ores at Bisbee, Arizona. This case has to do solely with events occurring in connection with those operations. Almost all of this ore is treated at the Company's smelter located at Douglas, Arizona, and thence leaves the State of Arizona in interstate commerce (R. 616).

In 1933 there was formed in Bisbee, Arizona, a labor organization known as Bisbee Miners' Union Local No. 30 of the International Union of Mine, Mill & Smelter Workers. Between the time of its organization and June 10, 1935, some of the Company's employees became members of that

union. In June, 1935, the Company had in its employ in connection with its mining operations at Bisbee, Arizona, approximately 950 persons (R. 530, 842). On June 6, 1935, eight men employed by the Company were discharged for "conduct which endangered the comfort and, to some extent, the safety" of their fellow workers (R. 844). The men discharged were members of the union. On the following evening, June 7, 1935, because of these discharges the union members voted to call a strike, effective June 10, 1935 (R. 100-102, 844). No demand was made upon the Company for the reemployment of these men and the Company was never given any notice of or statement of the reasons for the strike (R. 127-128, 657). On the morning of June 10, 1935, less than ten per cent of the persons on the Company's payroll ceased work and established picket lines (R. 101, 845).

For a period of approximately two weeks the Company's mining operations were somewhat impaired as a result of this cessation of work but by the end of June all of the strikers had been replaced and mining operations were normal (R. 531, 583-585, 845). The picket lines, however, were still in existence. This was the situation which existed on July 5, 1935, when the Act went into effect. On August 9, 1935, a committee representing the union called upon local officials of the Company and proposed the mass reinstatement of the men discharged on June 6, 1935, and of those who had walked out on June 10, 1935, as the basis for terminating the strike. This was the first instance of any communication between the union and the Company concerning any phase of the situation. On this occasion the local officials of the Company advised the representatives of the union that these men could not be reinstated because their jobs had been filled. On August 23, 1935, a similar meeting was held at which the same proposition was made by representatives of the union and a similar reply given by the local officials of the Company. There has been no meeting or request for a meeting since that date. On August 24, 1935,

the union officially terminated the strike and the picket lines were disbanded (R. 599-600, 650, 657-658, 845, Board's Exhibits 60, 61).

With the possible exception of one or two individuals, none of the men who walked out on June 10, 1935, has been reemployed by the Company. Of the forty-five individuals whose cases were before the Board, most have at some time since August 24, 1935, made applications for reemployment to the Company's employment agent, but none of them has been rehired. At the time of the hearing referred to in the next paragraph employees on the Company's payroll numbered approximately 1400, as compared with approximately 950 on June 10, 1935 (R. 842, 861, 863).

On May 25, 1937, the union filed charges under the Act against the Company alleging the commission of an unfair labor practice in refusing employment to six individuals who participated in the strike (R. 4). These charges were amended on December 18, 1937, the amended charges involving forty-seven men (R. 6-9). On January 10, 1938, the Board issued a complaint against the Company charging it with having engaged in unfair labor practices under subdivisions (1) and (3) of Section 8 of the Act in refusing to reinstate forty-eight individuals named therein (R. 10-27). Hearings on this complaint were held at Bisbee, Arizona, from January 27 to February 3, 1938. On March 16, 1938, the Trial Examiner's Intermediate Report was issued and to this report the Company filed with the Board exceptions and a supporting brief (R. 687-747). On May 5, 1938, the Company presented oral argument to the Board and on July 20, 1939, more than a year later, the case was re-argued (R. 749, 836). The Board's Decision and Order was issued on January 16, 1940, which was approximately two years and eight months after the filing of the charges (R. 837).

(b) *The Board's Decision and Order*

The Board found that the Company "systematically applied a general policy of refusing to reinstate or hire

persons who participated in the strike" (R. 861, 865-866), and that with respect to forty of the forty-five persons involved in the case this constituted an unfair labor practice within the provisions of subdivisions (1) and (3) of Section 8 of the Act (R. 908). The Board reached the conclusion of law that the "strike was a labor dispute involving a controversy over the tenure of employment of the eight union members discharged on June 8 (sic) 1935; that the strikers' work ceased as a consequence of that labor dispute which was current on July 5, 1935, the effective date of the Act; and that the strikers retained their status as striking employees on that date" (R. 862-863). It further concluded that "while it is true that the strikers' jobs had been filled by June 28, 1935, they occupied the status of striking employees on August 9, 1935, the date of their first mass application for reinstatement" (R. 863). Then, having found that between August 9 and August 24, 1935, the Company filled twenty-one vacancies but hired none of the strikers, the Board concluded that "on and after August 24, 1935, when the strike was formally ended the strikers retained their status as employees since between August 9, 1935, and the former date, the resumption of their status as working employees had been discriminatorily denied them by the Respondent's unfair labor practices" (R. 864).

The foregoing findings and conclusions were said by the Board to be applicable to only thirty-eight of the forty-five individuals involved in the case because the remaining seven were not in the Company's employ on June 10, 1935, when the walk-out occurred. The Board concluded, however, that as to all forty-five the Act afforded protection regardless of their status as employees (R. 864).

As a remedy for the unfair labor practices in which the Board had found the Company to be engaged, it ordered the Company to "reinstate" thirty-nine men with back pay and to give back pay to one man without reinstatement. The case was dismissed as to the other five (R. 916-919). According to the Board's order back pay for thirty-six of these

men runs from January 1, 1936, to the date of their reinstatement (R. 917). As to two, namely, Vernon Dell Curtis and Grover Gornett, the back pay period is broken between the dates of March 16, 1938, and January, 1940, because on the former date the Trial Examiner in his Intermediate Report recommended the dismissal of their cases and on the latter date the Board rejected that recommendation in its own Decision and Order (R. 913-914). As to one individual, William Daugherty, the back pay runs from January 15, 1937, to March 16, 1938, and from January 16, 1940, to date of reinstatement (R. 914). As to Henry Waters, back pay runs from January 1, 1936, to January 1, 1937, on which date, the Board found, he became unemployable (R. 913).

The Board found that none of the individuals involved in the case had obtained "other regular and substantially equivalent employment" within the definition of the term "employee" as set forth in Section 2(3) of the Act (R. 909) and went further to conclude that even if any one of them had obtained such employment it would still have the authority to order his reinstatement.

(c) *The lower court's decision*

Pursuant to Section 10(f) of the Act the Company obtained a review of the Board's Decision and Order in the lower court. The lower court held that since there was a labor dispute current on July 5, 1935, the effective date of the Act, the individuals on strike on that date were "employees" of the Company (R. 926). It, therefore, affirmed the Board's order as to the reinstatement with back pay of sixteen persons and as to back pay for the one person who had become unemployable. It remanded to the Board for further evidence the question of the equivalency of other employment obtained by twenty-one individuals, but ruled, contrary to the Board's contention, that if such equivalency were established the Board's order of reinstatement should be set aside (R. 927). It did, however, affirm the Board's order for the payment of back pay to these twenty-one per-

sons up to the time they obtained such other employment. As to two individuals who were not employed by the Company at the commencement of the strike the lower court set aside the Board's order of reinstatement and back pay (R. 928-929).

The lower court denied to the Company its request for judicial relief from the amount of the award of back pay, which request was predicated upon the excessive delay in the institution and final disposition of the case (R. 929), but did hold that the amount of back pay should be reduced not only by the actual earnings during the period between the unfair labor practice and the ultimate date of reinstatement, but also by such amounts as the persons involved "failed without excuse to earn" during that same period (R. 928).

Both the Company and the Board petitioned this Court for writs of certiorari to review the lower court's decision and the case is now before this court on the questions presented in their respective petitions.

Questions Presented

The following are the questions presented by the Company and the Board for consideration and decision by this Court:

1. Whether the lower court erred in setting aside the Board's order directing the Company to offer employment and "back pay" to two individuals who were denied employment because of their union activities, but who were not "employees" of the Company at the time of such denial.

2. Whether the lower court erred in holding that the individuals who went on strike on June 10, 1935, were "employees" of the Company on the effective date of the Act.

3. Whether the lower court erred in holding that the individuals who went on strike on June 10, 1935, were "em-

ployees" of the Company at the time they were refused reinstatement.

4. Whether the lower court erred in holding that the Board has no authority to order the reinstatement of individuals who were discriminated against while occupying the status of "employees" but who thereafter obtained "other regular and substantially equivalent employment."

5. Whether the lower court erred in holding that the Board has authority to order the payment of back pay to an individual as to whom it has no authority to order reinstatement.

6. Whether the lower court erred in holding that the Board in making an award of back pay must provide for the deduction of amounts which the recipients "failed without excuse to earn."

7. Whether the lower court erred in holding that the Company was not entitled to judicial relief from the amount of the back pay awarded.

Summary of Argument

I. It is not unfair labor practice for an employer to refuse employment because of union membership or activity to one who is not his "employee" as that term is defined in Section 2(3) of the Act, and the Board has no authority to order the employment or the payment of back pay to such a person;

A. The Act does not make such a labor practice unfair or give the Board such authority.

B. If construed to authorize the Board to require the employment of a person who was not an "employee" at the time he was discriminatorily refused employment, the Act would be in violation of the Fifth Amendment of the Constitution of the United States.

II. The individuals who went on strike on June 10, 1935, were not "employees" of the Company at the time the Act became effective and did not become such by virtue of the provisions of the Act.

III. The persons who went on strike on June 10, 1935, have at no time occupied the status of "employees" under the Act and no unfair labor practice has been committed by the Company.

A. The persons who went on strike on June 10, 1935, did not occupy the status of "employees" between July 5, 1935, and August 24, 1935, merely by virtue of the picketing which was discontinued on the latter date.

B. Even assuming that the persons who went on strike on June 10, 1935, were "employees" of the Company under the Act between July 5 and August 24, 1935, there was no discriminatory refusal to "reinstate" and consequently no unfair labor practice during that period.

C. The discriminatory refusals to hire occurred after August 24, 1935, but from and after that date the persons who had previously been on strike were clearly not "employees" and no unfair labor practice was committed.

IV. The Board has no authority under Section 10(c) of the Act to order the reinstatement of persons who were discriminated against while occupying the status of "employees" as defined in Section 2(3), but who thereafter obtained "other regular and substantially equivalent employment" within the meaning of the latter provision, because such persons no longer occupy the status of "employees."

V. Under Section 10(c) of the Act the Board's authority with respect to reinstatement and back pay is limited to "reinstatement of employees with or without back pay"

and the Board is not authorized to award back pay to persons as to whom it has no authority to order reinstatement.

VI. A person who has been the object of an unfair labor practice has the duty of exercising reasonable diligence to secure and retain other employment and the amount of back pay to which he might otherwise be entitled should be reduced by whatever amount he failed without excuse to earn.

VII. Where the representatives of persons who claim to have been discriminated against delay for more than two years before filing charges and the Board thereafter takes an additional two and a half years to dispose of the case, an employer who has been helpless during that entire period of time to obtain a determination of his rights and obligations is entitled to judicial relief from an excessive award of back pay.

ARGUMENT

I. It is not an unfair labor practice for an employer to refuse employment because of union membership or activity to one who is not his "employee" as that term is defined in Section 2(3) of the Act, and the Board has no authority to order the employment or the payment of back pay to such a person.

A. The Act does not make such a labor practice unfair or give the Board such authority.

1. Act applicable only to employees.

That the Act is concerned only with the protection of the rights of "employees" as therein defined appears from an examination of the entire statute. The findings and policy announced in Section 1 may be summarized as follows: The denial by employers to employees of the right to organize and bargain collectively leads to strikes and industrial un-

rest; the inequality of bargaining power between employers and employees tends to burden commerce and to aggravate recurrent business depressions; protection of employees' rights to organize and bargain collectively will restore equality of bargaining power between employers and employees and will tend to avoid labor disputes.

Section 2(3) gives a very carefully worded and comprehensive definition of the term "employee" and Section 7 defines in detail the rights of each such "employee," the free exercise of which rights the statute was designed to protect.

It is significant that in explaining the definition of the term "employee" referred to above, Senator Walsh, Chairman of the Senate Committee on Education and Labor, took considerable pains to show the reason for extending the term to include persons discriminatorily discharged or out on strike, and in so doing to mark the limit beyond which protection would not be afforded by the Act:

> "To hold otherwise for the purpose of this bill would be to withdraw the Government from the field at the very point where the process of collective bargaining has reached a critical stage and where the general public interest has mounted to its highest point. And *to hold that a worker who because of an unfair labor practice has been discharged or locked out or gone on strike is no longer an employee, would be to give legal sanction to an illegal act and to deny redress to the individual injured thereby.*" (italics ours) Senate Report No. 573, 74th Congress, 1st Session, p. 6.

It can be said without possibility of contradiction that the language of the statute not only fails to support the grant of authority contended by the Board, but also reveals a clear and consistent congressional intention to limit the Board's authority to the correction of abuses within the relationship between employers and employees.

2. Section 8(3) is clear in meaning.

In directing the Company to employ two persons who were discriminatorily refused employment and who were not "employees" of the Company at the time of such refusal, the Board relies chiefly upon the unfair labor practice defined in Section 8(3) of the Act. In this position it finds support in one Circuit Court of Appeals: *National Labor Relations Board* vs. *Waumbec Mills, Inc.*, 114 Fed. (2d) 226 (C. C. A. 1st, 1940). It finds opposition, however, in the lower court in the instant case and in *National Labor Relations Board* vs. *National Casket Company*, 107 Fed. (2d) 992 (C. C. A. 2nd, 1939) previously decided by that same court.

The controversy between the two courts centers about an interpretation of Section 8(3) which reads as follows:

> "Sec. 8. It shall be an unfair labor practice for an employer:
>
> * * *
>
> (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; * * *."

Obviously, it is the presence of the word "hire" which has given rise to this situation. The Company, with all due respect to the learned judges who have written opinions on the question, submits that both courts have ignored the plain meaning of the language chosen by Congress to express its intent. The Board has done the same thing. Apparently because the word "to" happens to precede the word "hire", all have been misled into believing that "hire" was being used as a verb. A careful reading, however, shows that rather than forming a part of the infinitive "to hire" the word "to" is a preposition and the word "hire" is used as a noun, just as the nouns "tenure," "term," and "condition" which follow. And the word "hire" as a nonn has a very plain and well understood meaning. It has been defined as follows:

"The price or compensation for labor and services or for temporary possession and use of another's property. A bailment that consists in the letting or furnishing of a chattel for temporary use for a compensation." Funk & Wagnall's New Standard Dictionary (1936 Ed.).

"The price, reward, or compensation paid or contracted to be paid for the temporary use of a thing or a place for personal service or for labor; pay; reward in its general sense, pay for the use of anything, including wages, rent and formerly interest; in specific sense, recompense paid for the use of a chattel other than money or for services." Webster's New International Dictionary (1931 Ed.).

Hire, n.: Compensation for the use of a thing, or for labor or services." Black's Law Dictionary (2nd Ed.) 572.

It has been consistently held by the courts to be an all-inclusive term used to describe the various types of compensation or reward for services.

In re Yoder, 127 Fed. 894, 895 (U. S. Dist. Ct. Pa. 1904);
Coviello vs. *Ind. Comm.*, 196 N. E. 661 (Ohio 1935);
Carr vs. *State*, 59 Ind. 178, 180 (Ind. 1875);
Reynolds vs. *Reynolds*, 58 Pac. (2d) 660, 661 (Cal. App. 1936);
Vol. 19 *Words and Phrases* (Perm. Ed.) 485-487.

Giving the word its obvious and plain meaning, it is clear that Congress chose it for the purpose of prohibiting an obvious method of discriminating against an employee because of his affiliation with a labor organization, i.e., by paying him at a lesser rate than one performing the same services but not so affiliated. It selected the word "hire" lest the use of a less inclusive term, such as "wages" or "salary" might leave room for evasion of the prohibition. The Company submits that if Congress had intended to extend the protection of the Act to other than "employees" and to prohibit discrimination in regard to hiring, it would

have used the word "hiring," or an appropriate synonym. The word "hire" having a plain and distinct meaning and being in no sense of the word synonymous with the word "hiring," there is no occasion to resort to other aids for interpreting its meaning.

To say that discrimination in hiring for the purpose of hampering the growth of labor organizations is in effect the use of the blacklist weapon against labor by employers and an evil even greater than those obviously prohibited by the Act is beside the point. See *National Labor Relations Board* vs. *Waumbec Mills, Inc.*, supra. It is for Congress alone to decide what practices shall be prohibited, and from the plain language of this statute it is clear that Congress did not intend to cover any practices, no matter how reprehensible, other than those to which it specifically adverted.

3. Section 10(c) is no justification.

In presuming to order the Company to hire strangers to whom employment has been discriminatorily denied, the Board also places reliance upon the language of Section 10(c) of the Act whereby it is authorized to direct an employer "to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." Without discussing at this point the restrictive nature of the foregoing language as regards the matter of "reinstatement" and "back pay", suffice it to point out that again the word "employee" is used and that as discussed above "the policies of the Act" as expressed in Section 1 are to eliminate labor disputes by protecting "employees" in their rights to organize and bargain collectively through representatives of their own choosing.

The conclusion that it was the intention of Congress by the language used in Section 10(c) to limit reinstatement to those occupying the status of "employees" is born out by the following language in the report of the Special Committee of the House of Representatives, 76th Congress, ap-

pointed pursuant to H. Res. 258 to investigate the National Labor Relations Board, with particular reference to the authority herein asserted by the Board and to the decision in the *Waumbec Mills* case, supra:

> "The language in Section 10(c) of the Act refers specifically to 'reinstatement' in the provision referring to back pay; nothing is said about original employment or 'instatement'."
>
> House Rep. No. 3109, Part 1, 76th, Congress, 3rd Session, p. 80.

4. *The legislative history does not support the Board's contention.*

Although a resort to the legislative history of the statute is not justified by any ambiguity in the language used, it is incumbent upon the Company to examine that history, arguendo, because the Board places great emphasis upon it. Such an examination shows no indication of an intention on the part of Congress to extend to the Board the authority which it seeks to exercise in this case.

The legislative history of the Act leaves no doubt but that the major purpose of Section 8(3) was to spell out in greater detail the prohibitions contained in Section 7(a) of the National Industrial Recovery Act (48 Stat. 195, C. 90) and in Section 3 of the Norris-La Guardia Anti-Injunction Act (47 Stat. 70, C. 90; 29 U. S. C. A. Sec. 101 et seq.), with particular reference to the outlawing of "yellow-dog" contracts.

Senator Wagner, from whom the act derives its more familiar appellation, made the following remarks with specific reference to Section 8(3) during debate on the measure:

> "This provision is merely a logical and imperative extension of that section of the Norris-La Guardia Act which makes the 'yellow dog' contract unenforceable in the Federal courts. If freedom of organization is to be preserved, the employees must have more than the knowledge that the courts

will not be used to confirm injustice. They need protection most in those very cases where the employer is strong enough to impress his will without the aid of the law. And it is perfectly obvious that unfair pressure may be exercised by *discrimination during employment as well as by actual discharge.*" (Italics ours.) Congressional Record, pp. 7570-1, 74th Congress, 1st Session.

The Senate Committee on Education and Labor discusses the particular provision as follows:

> "This provision rounds out the idea expressed in section 7(a) of the National Industrial Recovery Act to the effect that—
>
> No employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing * * *.
>
> Of course nothing in the bill prevents an employer from discharging a man for incompetence; from advancing him for special aptitude; or from demoting him for failure to perform. But if the right to be free from employer interference in self organization or to join or refrain from joining a labor organization is to have any practical meaning, it must be accompanied by assurance that its exercise will not result in discriminatory treatment or loss of the opportunity for work." Senate Report No. 573, 74th Congress, 1st Session, p. 11.

The House Committee on Labor gives substantially the same explanation:

> "The third unfair labor practice prohibits an employer, by discrimination in regard to hire or tenure of employment or any term or condition of employment, to encourage or discourage membership in any labor organization. This spells out in greater detail the provisions of section 7(a) prohibiting 'yellow-dog' contracts and interference with self-organization. This interference may be present in a

variety of situations in this connection, such as discrimination in discharge, lay-off, demotion, or transfer, hire, forced resignation, or division of work; in reinstatement or hire following a technical change in corporate structure, a strike, lock-out, temporary lay-off, or a transfer of the plant.

Nothing in this subsection prohibits interference with the normal exercise of the right of employers to select their employees or to discharge them. All that is intended is that the employer shall not by discriminatory treatment in hire or tenure of employment or terms or conditions of employment, interfere with the exercise by employees of their right to organize and choose representatives. It is for this reason that the employer is prohibited from encouraging or discouraging membership in any labor organization by such discrimination." House Report No. 1147, 74th Congress, 1st Session, p. 19.

In the light of these committee reports it is illuminating to read again the provisions of Section 7(a) of the National Industrial Recovery Act, supra:

"(1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection;

(2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing; * * * ."

Where can one find in that language anything prohibiting a discriminatory refusal to hire a stranger?

Section 8(3) of the Act makes the obtaining of any type of "yellow dog" contract of employment an unfair labor

practice but it in no wise limits an employer's freedom to refuse to hire for union activity or for any other reason. The Senate Report makes the following statement:

> "The unfair labor practices listed in this bill are supported by a wealth of precedent in prior Federal law." Senate Report, supra, pages 8-9.

It has never been suggested that there is precedent for compelling an employer to hire any particular applicant for work. The House Report explains that subdivisions (2), (3), (4) and (5) of Section 8 merely state specific types of practices that were dealt with generally in subdivision 1 of that section.

House Report, supra, p. 17.

It follows that since Section 8(1) is expressly limited to "employees", Section 8(3) was not intended to protect mere applicants for employment. This view is greatly strengthened by the fact that both reports introduced the discussion of Section 8 with the title **Rights of Employees.**

Senate Report, supra, p. 8;
House Report, supra, p. 15.

Nowhere in the legislative history of the Act is there any reference to the matter of hiring. If the provisions of Section 8(3) were merely intended to prohibit discrimination with respect to the remuneration of employees and the tenure of their employment and to outlaw "yellow dog contracts," all of which matters were familiar subjects of legislation, it is not difficult to understand the absence of debate over the question now under discussion. If, on the other hand, they were understood to include in the act the enforced selection of applicants for employment, one can hardly believe that the members of Congress would have been so completely passive in their acceptance of a measure without precedent in the laws of this country.

B. If construed to authorize the Board to require the employment of a person who was not an "employee" at the time he was discriminatorily refused employment, the Act would be in violation of the Fifth Amendment to the Constitution of the United States.

If it be assumed for the purpose of argument that Congress intended to give to the Board the power to order the employment of strangers, the question arises as to the constitutionality of the statute so construed. The question can be briefly expressed: "Can Congress enact a law whereby one individual can be compelled against his will to enter into a contract of personal service with another?"

The decisions of this Court have imposed the important qualification on the liberty of contract that it shall yield to the reasonable exercise of the powers granted to Congress. The question thus becomes one of degree,—when does interference with freedom of contract become unconstitutional? The more arbitrary the measure, the more urgent must be the public policy to justify it.

This Court has held that the policy behind the Act was sufficiently pressing to justify invasion of private contractual rights. It has upheld the prohibition against discharge of an employee because of union membership.

> *National Labor Relations Board* vs. *Jones & Laughlin Steel Co.*, 301 U. S. 1, 81 L. Ed. 893 (1937).

It has also upheld the provisions of the Railway Labor Act (1926, C. 347, 44 Stat. 577; 1934, C. 691, 48 Stat. 1185) prohibiting employer interference with employee organization and selection of representatives.

> *Texas & N. O. Ry. Co.* vs. *Brotherhood of Railway & Steamship Clerks*, 281 U. S. 548, 74 L. Ed. 1034 (1930);
> *Virginian Ry. Co.* vs. *System Federation No. 40*, 300 U. S. 515, 81 L. Ed. 789 (1937).

These decisions, however, go no farther than validating the imposition of restrictions on contracts freely made. The question before the Court now is whether the attempt of

the Board to stretch the wording of the Act to force employers to *enter* into contracts for personal services is not an added encroachment upon the liberty of contract which goes beyond the realm of permissibility heretofore outlined by the Court. It is one thing to say that if a person does see fit to enter into a contract it shall be governed and modified by certain statutory restrictions and an entirely different thing to say that he must enter into the contract if his unwillingness so to do is predicated upon one particular objection.

It has been said by this Court that its earlier decisions in *Adair* vs. *U. S.*, 208 U. S. 161, 52 L. Ed. 436 (1908) and *Coppage* vs. *State of Kansas*, 236 U. S. 1, 59 L. Ed. 441 (1915) are "inapplicable to legislation of this character".

> *National Labor Relations Board* vs. *Jones & Laughlin Steel Corp.*, supra;
> *Texas & N. O. Ry. Co.* vs *Brotherhood of Railway & Steamship Clerks*, supra;
> *Virginian Ry. Co.* vs. *System Federation No. 40*, supra.

It is the Company's interpretation of this statement that the passage of time has shown that some of the language used in the *Adair* and *Coppage* cases was too broad for application under present day circumstances and that insofar as these cases invalidate legislation prohibiting the discharge of an employee for union activities (*Adair* case) and legislation prohibiting the execution of a "yellow dog" contract as a condition of employment (*Coppage* case), they are no longer the law of the land. But this Court has given a clear explanation of the extent of its decision in the *Jones & Laughlin* case, supra, in the following statement in *National Labor Relations Board* vs. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 347, 82 L. Ed. 1381, 1391 (1938):

> "We have held that, in the exercise of the commerce power, Congress may impose *upon contractual relationships* reasonable regulations calculated to

> protect commerce against threatened industrial strife (citing Jones & Laughlin case). The Board's order there sustained required the reinstatement of discharged employees. The requirement interfered with freedom of contract which the employer would have enjoyed except for the mandate of the statute." (Italics ours)

This language affords no justification for the claim that Congress can enact legislation whereby an employer may be forced to enter into a contract of personal service with a stranger. His freedom to refrain from so doing was clearly recognized in the dissenting opinions in the *Adair* and *Coppage* cases, supra. In the *Adair* case, Mr. Justice Holmes, in his dissenting opinion, made the following statement at page 191:

> "The section is, in substance, a very limited interference with freedom of contract, no more. It does not require the carriers to employ any one. It does not prevent them to refuse to employ any one, for any reason they deem good, * * *. The section simply prohibits the more powerful party to execute certain undertakings, or to threaten dismissal or unjustly discriminate on certain grounds *against those already employed.*" (Italics ours)

In the *Coppage* case Mr. Justice Day in a dissenting opinion in which the present Chief Justice concurred, had this to say at page 35:

> "It would be impossible to maintain that because one is free to accept or refuse a given employment, or *because one may at will employ or refuse to employ another*, it follows that the parties have a constitutional right to insert in an agreement of employment any stipulation they choose." (Italics ours.)

That such freedom of refusal to employ is still recognized is apparent from the following language used in the *Jones & Laughlin* case (p. 45):

> "The Act does not compel agreements between employers and employees. It does not compel any agreement whatever."

And in *The Associated Press* vs. *National Labor Relations Board*, 301 U. S. 103, 81 L. Ed. 953 (1937), at page 132, it was said:

> "The Act does not compel the petitioner to employ anyone; * * *."

There is a logical distinction between imposing limiting conditions upon a contract and forcing the creation of a contract. An attempt by Congress to deny to an employer this primary right to hire whom he pleases would be, we submit, unconstitutional under the Fifth Amendment.

In this regard it is proper to consider the approach of Congress and the courts to the problem of freedom of contract in other fields of the law. In the Clayton Act of 1914, strengthened and reenacted in 1936, Congress, while seeking primarily to prevent price discrimination, nevertheless expressly provided that a man should not be forced to make any contract against his will. The wording is identical in both acts:

> "And provided, further, That nothing herein contained shall prevent persons engaged in selling goods, wares, and merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade." October 15, 1914, C. 323, Sec. 2, 38 Stat. 730. June 19, 1936, C. 592, Sec. 1, 49 Stat. 1526.

In the only case directly concerned with the construction of this section, the United States Circuit Court of Appeals for the Second Circuit said in *Great Atlantic and Pacific Tea Co.* vs. *Cream of Wheat Co.*, 227 Fed. 46, 48 (1915):

> "We had supposed it was elementary law that a trader could buy from whom he pleased and sell to whom he pleased, and that his selection of seller and buyer was wholly his own concern."

The court added at page 49:

> "Before the Sherman Act it was law that a trader might reject the offer of a proposed buyer, for any reason that appealed to him; it might be because he had some personal difference with him, political, racial, or social. That was purely his own affair, with which nobody else had any concern. Neither the Sherman Act, nor any decision of the Supreme Court construing the same, nor the Clayton Act, has changed the law in this particular. We have not yet reached the stage where the selection of a trader's customers is made for him by the government."

Construing the Lever Act (C. 53, 40 Stat. 276), which fixed the price of coal during the first World War, this Court in *Highland* vs. *Russell Car & Snow Plow Company*, 279 U. S. 253, 73 L. Ed. 688 (1929), while refusing to allow recovery of more than the statutory price, said, at page 262: "Plaintiff was free to keep his coal." Neither the Lever Act nor the Clayton Act attempts to force the formation of contracts between specific persons. They merely control the terms upon which certain contracts may be entered into if the parties see fit to contract.

The Board may suggest that under the Fourteenth Amendment states have been allowed to enforce the making of contracts with pilots in certain harbors against the shipowner's will.

> *Ex Parte McNeil*, 13 Wall. 236, 80 U. S. 236, 20 L. Ed. 624 (1872).

We call attention to the peculiar circumstances making essential that solitary exception to the general rule as a police measure for safety in harbor traffic. Pilots are not employees, and contracts for their services are in the nature of a tax to maintain a vital public function.

The fundamental policy of the Act is to safeguard the rights of employees to self organization and collective bargaining.

> *National Labor Relations Board* vs. *Fansteel Metallurgical Corp.*, 306 U. S. 240, 83 L. Ed. 627.

If it should be extended to confer rights upon applicants for employment and thereby become an instrument whereby the federal government could force the making of contracts for personal services and thus unionize all industry it would be, we submit, an unreasonable exercise of the powers granted to Congress.

II. The individuals who went on strike on June 10, 1935, were not "employees" of the Company at the time the Act became effective and did not become such by virtue of the provisions of the Act.

Obviously the argument with respect to the remaining questions presented for the consideration of the Court proceeds on the theory that the protection afforded by the Act is limited to "employees" as therein defined, and that the Board has no authority to order the employment of one not occupying that status who has been discriminatorily refused a job.

The term "employee" as defined in Section 2(3) of the Act is considerably broader in its scope than is the common law definition of the same term. Under the Act it is not limited to the relationship with a particular employer and includes "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice and who has not obtained any other regular and substantially equivalent employment." Thus, one who at common law would stand in the position of a stranger to the Company might now by virtue of the definition contained in the Act occupy the status of an "employee".

If construed so as to give it a retroactive effect the Act would clearly violate the provisions of the Fifth Amendment to the Constitution of the United States in that by transforming the past status of a stranger to that of an employee it would empower the Board to force an employer against his will to employ an individual who prior to the time the

Act became effective could lay no claim to the status of an employee (Argument I, B, supra).

It is a fundamental rule of construction that a statute should have a prospective operation only unless its terms show clearly a legislative intention that it should operate retroactively.

> *Fullerton-Krueger Lumber Co.* vs. *Northern Pacific Ry. Co.*, 266 U. S. 435, 69 L. Ed. 367 (1925); *Brewster* vs. *Gage*, 280 U. S. 327, 74 L. Ed. 457 (1930).

There is no justification for inferring such an intention from the terms of the Act.

> *National Labor Relations Board* vs. *National Casket Co, Inc.*, supra.

The individuals now under discussion ceased work for the Company on June 10, 1935. In the light of the foregoing discussion, and if as a matter of law and fact they lost their status as employees of the Company prior to July 5, 1935, the provisions of the Act could not operate retroactively to restore them to that status. It becomes necessary, therefore, to consider and determine the relationship existing between them and the Company during the period from June 10 to July 5, 1935.

It has long been recognized by the courts that an individual by going on strike does not thereby terminate entirely the employer-employee relationship and become a total stranger to his former employer. Based upon the realization that such an individual does not completely abandon his employment but, on the contrary, still lays claim to his job, it has been generally held that at least for some period of time the employer-employee relationship continues to exist and the individual assumes the status of a "striking employee". It is upon this theory that the Circuit Court of Appeals for the Ninth Circuit in *National Labor Relations Board* vs. *Carlisle Lumber Co.*, 94 Fed. (2d) 138, cert. den. 304 U. S. 575, 82 L. Ed.

1539 (C. C. A. 9th, 1937), upheld an order of the Board directing reinstatement of individuals who were on strike on the effective date of the Act and who were subsequently the objects of discrimination. Because those individuals were in legal effect "striking employees" on that date, regardless of the provisions of the Act, it could not be said that the court was interpreting the Act in such a way as to make it retroactive in operation and to empower the Board to force the lumber company to enter into contracts of employment with strangers. The same situation existed in two other cases involving strikes which commenced prior to the effective date of the Act and in both the court emphasized the fact that the men ultimately refused reinstatement were "striking employees" on July 5, 1935.

> *Jeffery-De Witt Insulator Co.* vs. *National Labor Relations Board*, 91 Fed. (2d) 134, cert. den., 302 U. S. 731, 82 L. Ed. 565 (C. C. A. 4th, 1937); *Standard Lime & Stone Co.* v. *National Labor Relations Board*, 97 Fed. (2d) 531 (C. C. A. 4th, 1938).

The instant case does not, however, present a parallel situation. These individuals did not enjoy that peculiar status of "striking employees" on the effective date of the Act. They were then, and have been ever since, in a legal sense, strangers to the Company. In the first place, the action taken by these and other individuals on June 10, 1935, did not constitute a strike as that term has been consistently defined by the courts. They could not, therefore, have acquired at any time the status of "striking employees". Secondly, even if their action did constitute a strike, they had lost their status of "striking employees" prior to July 5, 1935. We shall consider these two points separately.

The record shows that on June 10, 1935, a group of employees constituting less than ten per cent of the total number of persons on the Company's payroll on that date ceased work and participated in picketing activities (R.

101, 845). There had been no previous dispute as to terms, tenure or conditions of employment and there had been no attempts made to obtain the Company's compliance with any requests made by the union. There is no evidence of any requests made by the union which were pending on June 10, 1935, or immediately prior to that date. No demands whatsoever had been made upon the Company. No meeting had been requested or held for the purpose of presenting or discussing demands, and no notice was given to the Company of an intention to strike or of the reasons for such action (R. 127-128, 657). The common import of the word "strike" necessarily involves as an element an attempt to compel the employer by collective action to accede to certain demands. It is more than a simultaneous cessation of work on the part of employees. Webster's New International Dictionary (2nd Ed.), defines the word "strike" as follows:

> "Act of quitting work; specif., such an act done by mutual understanding by a body of workmen as a means of enforcing compliance with demands made on their employer."

In *Uden* vs. *Schaefer*, 188 Pac. 395, 396 (Wash. 1920) the Supreme Court of the State of Washington gives the following definition:

> "A 'strike', in such common acceptation, is the act of quitting work by a body of workmen for the purpose of coercing their employer to accede to some demand they have made upon him, and which he has refused."

In *Walter W. Oeflein Inc.* vs. *State*, 188 N. W. 633 (Wis. 1922) an employer was working his employees longer hours than permitted by the union rules. For this reason a group of union employees ceased work but made no previous demand upon the employer that he conform to the union rules and gave no notice of their reasons for quitting their jobs. In holding that in that situation a

strike did not exist the Supreme Court of the State of Wisconsin made the following statement (p. 635):

> "* * * it first becomes incumbent upon the members or representatives of such unions to make a demand upon the employer in order to lay the basis for a refusal. Such a view is in harmony with the fundamental thought underlying the definition of a strike under the common acceptation of the term, and it logically follows that it is contemplated that a strike exists after the demands of employees are made and refused, as the result of which the employees are withdrawn from the employment."

A mere quitting of work for no apparent purpose and not as a means of enforcing the employer to meet certain demands does not fall within the definition of the word "strike" and the courts in the following cases recognize this fact when they include in their definitions of that word the necessary element of a dispute or demand:

Iron Molders' Union v. *Allis-Chalmers Co.*, 166 Fed. 45 (C. C. A. 7th, 1908);
Dail-Overland Co. v. *Willys-Overland*, 263 Fed. 171 (D. C. Ohio, 1919);
Jennings v. *Lee*, 295 Fed. 561 (D. C. N. Y., 1923);
Birmingham Trust Co. v. *Atlanta B. & A. Ry. Co.*, 271 Fed. 743 (D. C. Ga., 1921);
Moreland Theatres Corp. v. *Machine Operators' Protective Union*, 140 Ore. 341, 12 Pac. (2d) 333 (Ore. 1932);
Longshore Printing Co. v. *Howell*, 26 Ore. 527, 38 Pac. 547 (Ore. 1894);
Smith v. *Eagle Coal & M. Co.*, 155 S. W. 886 (Kansas City Ct. of App., Mo., 1913);
Pierce v. *Stablemen's Union*, 156 Cal. 70, 103 Pac. 324 (Cal. 1909);
West Allis Foundry Co. v. *State*, 202 N. W. 302 (Wis., 1925).

Applying these authorities to the situation presented by the record in the instant case, a record which reveals affirmatively that there was no demand, no notice and no contro-

versy, the conclusion is inevitable that the cessation of work on June 10, 1935, did not constitute a "strike". Not having participated in a "strike", the individuals here under discussion most certainly did not become "striking employees". By their action they voluntarily quit their employment and severed all relationship with the Company. Accordingly, they were on July 5, 1935, total strangers to the Company.

But even assuming that at the time these and other individuals ceased work on June 10, 1935, they acquired the status of "striking employees", another compelling line of authorities leads to the obvious conclusion that they lost that status prior to July 5, 1935. In other words, even if it could be held that this unheralded cessation of work by a relatively small group of individuals came within the definition of the word "strike" so that they would stand in the relationship of "striking employees" to the Company, the record shows clearly that prior to July 5, 1935, that "strike" had ceased to exist. Obviously an individual who leaves his employment as an incident to strike activities does not occupy indefinitely the status of a "striking employee". He maintains that status only so long as the strike continues. The authorities are clear to the effect that if the places of all "striking employees" have been filled and the employer's operations have returned to normal the strike is terminated, for the controversy, which in the instant case must be assumed, has reached an end.

The court in *Dail-Overland Co.* v. *Willys-Overland, Inc.*, supra, was confronted with a situation where a manufacturing plant had undergone a strike by a group of its employees. Picketing was still going on, but there were more persons at work than at the time the strike was called and the plant was operating at full capacity. In holding that the individuals who had ceased work as a consequence of the strike were no longer "employees", within the meaning of that term in the Clayton Act, the court made the following statement (p. 188):

> "As long as conditions are such that what is called a 'settlement' might seem reasonably possible between

the company and its late workmen, the latter, it seems, should be considered 'employees', within the meaning of that term in the Clayton Act. But when the controversy has reached a practical end, there is no reason why the term 'employee' should not be held to its ordinary meaning of one who actually works for hire for another and under the latter's control."

In *West Allis Foundry Co.* v. *State*, supra, the defendant had been convicted under a statute which made it unlawful to induce employees to engage in service by false advertising through failure to state that there is a strike at the proposed place of employment, when, in fact, a strike actually exists. In reversing the conviction on the ground that at the time charged in the information no strike did, in fact, exist at defendant's plant, the court made the following statement which reveals the factual situation and the law applicable (p. 306):

"Picketing and persuading others to keep away from such employment are but incidents of and not the strike itself. At the time of the advertisement in February, 1924, the force or economic pressure that had been exerted on the employer by such withdrawal was no longer in existence. At such time the employer had more than a normal and usual force of men and more than the normal and usual force of core makers and moulders at work.

* * * * * * * * * *

The production obtained as a result of the work being then done by such in the factory was in fact increasing its capacity. Clearly the conditions in defendant's business were then such that it was not materially affected by the strike, and there were no reasonable grounds for believing that a continuance thereof would materially affect defendant's business.

We are compelled, therefore, to come to the conclusion that at the time charged in the information

there was not a strike actually existing, and that the conviction cannot be sustained."

Likewise in *M. Steinert and Sons Co.* v. *Tagen*, 93 N. E. 584 (Mass., 1911), where the plaintiff had, within a short time after a strike of its teamsters had commenced, secured others to take their places and had at all times thereafter maintained an adequate working force, the court held that the strike no longer existed.

In *Quinlivan* v. *Dail-Overland Co.*, 274 Fed. 56, 65 (C. C. A. 6th, 1921), the Circuit Court of Appeals for the Sixth Circuit, made the following statement:

> "The objection that peaceful persuasion and peaceful picketing were improperly forbidden by the final order is, to our minds, sufficiently answered by the considerations announced by the trial judge, viz. that there was no longer a controversy between the Overland Company and its employees respecting terms and conditions of employment; that the plant was then running at full capacity and full production; that the strike had then long ceased to exist, except for certain annoying manifestations on the part of a comparatively few people; and that none of those so engaged could longer be regarded as employees."

This fundamental principle has not been changed by the Act. In *National Labor Relations Board* v. *Columbian Enameling & Stamping Co.*, 306 U. S. 292, 83 L. Ed. 660 (1939), this Court had before it the question of the reinstatement of men who had gone on strike prior to the effective date of the Act. In refusing to enforce the Board's order the Court made the following statement (p. 296):

> "The evidence and findings leave no doubt that later, in September, respondent ignored the Union's request for collective bargaining, but as at that time respondent's factory had been reopened and was operating with a full complement of production employees, the refusal to bargain could afford no basis

for an order by the Board directing, as of that date, the discharge of new employees and their replacement by strikers. Restoration of the strikers to their employment, by order of the Board, under Section 10(c) of the Act, could as a practical matter be effected only if respondent had failed in its statutory duty to bargain collectively at some time after the approval of the National Labor Relations Act on July 5th, and *before respondent had resumed normal operation of its factory.*" (Italics ours.)

See also *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, supra.

In *National Labor Relations Board* v. *Carlisle Lumber* Co., supra, the court had before it a situation where on May 3, 1935, two hundred sixty-three out of three hundred forty-four employees went out on strike and on the following day the lumber mill was closed down. Operations had not been resumed by July 5, 1935, and subsequent to that date the employer attempted to start the mill up again by requiring strikers who returned to work to renounce their union affiliations. In that situation those who would not meet the condition imposed and were, therefore, refused jobs, were ordered to be reinstated by the employer, and the court affirmed that order.

In *Standard Lime & Stone Co.* v. *National Labor Relations Board*, supra, and in *Jeffery-De Witt Insulator Co.* v. *National Labor Relations Board*, supra, both being cases which came before the Circuit Court of Appeals for the Fourth Circuit, and involving strikes which commenced prior to July 5, 1935, the court emphasizes the fact that on that date the plants involved were being operated without full complements of workers and far below normal capacities, and that the strikes were in full progress.

In the light of these authorities and of the indisputable proposition which they support, we turn to the record in the instant case. It presents clearly and on uncontradicted

testimony a situation where the places of all who ceased work on June 10, 1935, had been filled, and mining operations had returned to normal, prior to July 5, 1935. It appears (R. 530-531) that on June 7, 1935, there were nine hundred forty-one persons on the Company's payroll; that on June 21, 1935, there were nine hundred fifty-two; that on June 28, 1935, there were nine hundred eighty-six; and that on July 3, 1935, there were nine hundred ninety-six. As to the number actually working on those dates, it further appears (R. 531) that on June 7, 1935, there were seven hundred sixty-six; on June 21, seven hundred fifty-nine; on June 28, seven hundred sixty-six; and on July 3, eight hundred eight. These figures do not include persons employed as special watchmen. In other words, on July 3, 1935, there were eight hundred eight persons actually engaged in the production of copper and the duties pertaining to that operation, as compared with seven hundred sixty-six persons who were so engaged just prior to the so-called strike. As to the status of the Company's operations, petitioner's General Mine Foreman testified (R. 584) that at least by the last week in June, 1935, the Company's operations were normal.

The Board itself has made findings on this uncontroverted evidence (R. 845). Referring to the fact that less than ten percent of petitioner's nine hundred fifty employees walked out on June 10th, the Board made the following finding of fact as to the effect of such action on the Company:

> "The mine was not closed but continued to operate on a curtailed basis for several weeks until it resumed normal operations. By June 28, 1935, all the strikers' jobs had been filled."

The lower court made the following reference to the Board's findings (R. 925):

> "The Board found that by June 28th the petitioner had succeeded in filling the places of all the strikers and had resumed normal operations at the mine."

What conclusion can be reached other than that on July 5, 1935, no strike existed and that, even if they had at one time occupied the status of "striking employees", the individuals who ceased work on June 10, 1935, had lost that status and had become strangers to the Company? To be sure, the record shows that picketing continued until August 24, 1935, but, in that connection, suffice it to quote the language of the court in *Dail-Overland Co.* v. *Willys-Overland, Inc., supra* (p. 188):

> "We cannot recognize the right of individuals to prolong, long after its substance has fled, a labor controversy, and to demand that it be accorded special consideration as a real and substantial industrial dispute, with advantages to them derivable from a law said to discriminate in favor of their class if certain conditions exist."

The Board found (R. 862-863) "that the strike was a labor dispute involving a controversy over the tenure of employment of the eight union members discharged on June 8 (sic), 1935; that the strikers' work ceased as a consequence of that labor dispute which was current on July 5, 1935, the effective date of the Act; and that the strikers retained their status as striking employees on that date." This is not a finding of fact. It is a conclusion of law, and the Company respectfully submits that it is erroneous.

The lower court entirely lost sight of the point in question. It disposed of the decisions which have just been cited to this Court by stating that "none of them dealt with what is a current labor dispute within the meaning of the statute controlling here, and, while interesting, are presently of little help" (R. 926). It went on to reach its conclusion in the following language (R. 926):

> "Had the Act been effective when the strike began in June there would, of course, be no question of the retention by the strikers of their status, under

the statute, as employees. The sufficiently supported finding of the Board, however, carries the labor dispute into July 5, and that is enough to make the strikers employees within the meaning of the Act when they were refused reinstatement."

Whether or not there was a labor dispute current on July 5, 1935, is beside the point. On July 4, 1935, there was no such thing as the Act and on that day, the day preceding the effective date of the Act, the status of these individuals as "striking employees" or as strangers was governed by the law of that earlier date, unsupplemented by the Act. It is clear that under that law these individuals were strangers. We submit that using the language of the Act to convert those who were strangers on July 4, 1935, into "employees" of the Company on July 5, 1935, is to give the Act a retroactive effect not warranted by its terms and to create a contractual relationship which theretofore did not exist.

III. The persons who went on strike on June 10, 1935, have at no time occupied the status of "employees" under the Act and no unfair labor practice has been committed by the Company.

A. The persons who went on strike on June 10, 1935, did not occupy the status of "employees" between July 5, 1935, and August 24, 1935, merely by virtue of the picketing which was discontinued on the latter date.

Turning now to the provisions of the Act and the situation to which they became applicable on July 5, 1935, we examine the status of these individuals between that date and August 24, 1935, only because the Board has concluded that they were the objects of discrimination during that period. That that conclusion is not supported by the record is the subject for discussion in the sub-paragraph to follow. For the purpose of the present discussion only we assume it to be correct.

Whether or not these men were "employees" depends entirely upon the application of the definition of that term in Section 2 (3) to the circumstances in which we find them during this particular period. Were they individuals whose work had ceased as a consequence of, or in connection with, a current labor dispute? If so, they were employees. The answer to this question depends on the meaning of the term, "current labor dispute", as used in the Act. It appears to us that the word "current" can be interpreted as being applicable to one of three times. It could mean "current" at the time the work ceased, or "current" at the time the Act went into effect, or "current" at the time conduct prohibited by the Act occurred. Under the first possibility any individual who went on strike as a consequence of, or in connection with, a labor dispute "current" at the time he ceased work would remain an "employee" in perpetuity. Such an interpretation is obviously ridiculous. The second possibility is too narrow in scope and would render this portion of the definition of an "employee" meaningless. The third, we submit, is the only plausible interpretation. As so construed, the Act would afford protection against discrimination or a refusal to bargain to those whose work has ceased as a consequence of, or in connection with, a labor dispute current at the time of such discrimination or refusal. We adopt that interpretation and apply it to the facts in the instant case.

The situation between July 5 and August 21, 1935, remained constant. The strikers' places had been filled and the Company's operations were normal. The force or economic pressure that had been originally exerted on the Company with the cessation of work on June 10th had long since been spent. Any possibility of the strikers' forcing the issue to a successful conclusion had disappeared, and yet each day this group picketed the mine entrances and unsuccessfully attempted to persuade a full complement of workers to refrain from working. This situation could have gone on forever. Let us suppose for the moment that it was

still going on today and that the situation was just exactly the same now as it was in July and August of 1935. Could it be said that after almost six years a labor dispute was still current? Could it be said that after almost six years the Company had both a full complement of working employees and 95 non-working employees? Such a conclusion would seem highly ridiculous, and yet if it is correct as to the situation then it is equally correct now.

The sole question to be determined is whether picketing, which is not a labor dispute but merely an incident thereto, is in and of itself sufficient under the Act to maintain the currency of a labor dispute. If it is, then Congress has placed in the hands of labor organizations the sole power to render a labor dispute "current" or terminated as best suits their purposes. If, by exercising the power to maintain the currency of labor disputes long after their substance has fled, labor organizations can thereby preserve indefinitely for their members the status of "employees", with all of the rights and privileges which the Act affords to those occupying that status, what has become of the policy of Congress to eliminate disputes which obstruct the free flow of commerce? We submit that the existence and exercise of such power in the hands of either party to the industrial relationship would increase in number and prolong in length the unreasonable disputes which it was the purpose of Congress to eliminate.

We understand the policy of the federal government to be one designed towards the establishment of equality in industrial relations. To this end the Norris-LaGuardia Anti-Injunction Act was enacted to protect labor in the legitimate exercise of its right to peaceable persuasion. To the same end was designed the statute enacted in 1936 to prohibit the transportation of strikebreakers in interstate commerce. (49 Stat., 1899.) And so also the Act now under discussion was passed to protect labor in the exercise of its right to self organization and the selection of representatives for collective bargaining. We submit that

it was neither the purpose nor the policy of the Congress which enacted this statute to create the inequality in industrial relations which would result from the decision of the lower court in this case, protecting labor in the unreasonable use of the strike weapon. Accordingly we submit that under the Act there was no labor dispute current between July 5, 1935, and August 24, 1935, and therefore no unfair labor practice could have been committed by the Company with respect to these men.

B. Even assuming that the persons who went on strike on June 10, 1935, were "employees" of the Company under the Act between July 5 and August 24, 1935, there was no discriminatory refusal to "reinstate" and consequently no unfair labor practice during that period.

If it be held, contrary to the position taken by the Company in the foregoing sub-paragraph, that the mere continuation of picketing manifested a "current labor dispute" and maintained these persons in the status of "employees" until August 24, 1935, nevertheless the Board's order can only be sustained on the legal conclusion that as such "employees" they were the objects of an unfair labor practice prior to that date. The record gives no support to such a conclusion. Throughout the period from July 5, 1935, the effective date of the Act, to August 24, 1935, when the strike was officially terminated and picketing ceased, the status of these persons, whatever it was, remained the same. Their places had all been filled, the Company's operations were normal, but they continued "on strike" in a mass refusal to work and evidenced that position by their strike activities and in their communications to the Company. With that situation clearly in mind, we must now look for an act on the part of the Company which constituted an unfair labor practice.

The lower court gave no indication in its decision of when it considered an unfair labor practice to have been committed. It merely stated (R. 926) that the strikers

were "employees within the meaning of the Act when they were refused reinstatement". Likewise it is difficult to determine from the Board's Decision and Order the date which it believed to be the one on which an unfair labor practice occurred. Specific reference, however, was made therein to events which transpired on August 9th and August 23rd and the statement was made with reference to the strikers (R. 864) that between August 9th and August 24th "the resumption of their status as working employees had been discriminatorily denied them by the respondent's unfair labor practices".

In view of the foregoing statement by the Board, it becomes necessary to analyze carefully what took place on August 9th and August 23rd. On both occasions a committee representing the "strikers" met with representatives of the Company and offered to call off the "strike" if the Company would put back to work the eight men discharged on June 6th and all of the men who walked out on June 10th. The Board itself (R. 863) refers to these meetings and the identical propositions put forth at each as "mass applications for reinstatement". Now just what did these "mass applications" mean? The record shows that approximately ten percent. of the approximate 950 persons on the Company's payroll on June 10th went on strike. That would indicate that there were about 95 persons, plus the 8 discharged on June 6th, or a total of 103 men, who were included in the applications. The proposition made by the union on each occasion was that if the Company would put 103 men to work en masse the "strike" would be called off and that if it would not do so the "strike" would continue as well as the picketing activities incident thereto. In other words, it was an "all or nothing" proposition. And what did the representatives of the Company do? They replied that the places of all of the men had been filled, as the record shows, and, both logically and lawfully, they refused to make room for 103 men by displacing those who had taken

their jobs. They were acting in accordance with the principles laid down by this Court in so doing.

National Labor Relations Board vs. *Mackay Radio and Telegraph Company*, supra.

The Board emphasizes (R. 863) the fact that between August 9th and August 24th the Company hired 21 men. This fact has no bearing on the legal effect of its refusal to employ 103 men en masse during that same period of time. The record shows that from day to day the need arose for additional men here and there. It also shows that it was the customary practice to hire only men who were available for employment and who were in the "rustling" line outside of the employment office at the time the need arose to fill a job. The Company had been told by these 103 men that if they were not all put back to work no one of them would work. It treated them accordingly. Obviously a group of men cannot be refusing collectively to work in order to enforce a demand on their employer, i. e., on strike, and at the same time seeking employment. An impasse is reached in asserting either position in this case. If the "strike" was still on, as the union represented, there was no unfair labor practice in refusing to put 103 unneeded men to work en masse as demanded. If, on the other hand, the 103 men were seeking work individually as jobs became available and in spite of the Company's refusal to put all 103 to work at once, then the "strike" was off, the labor dispute had terminated and no one of them was an "employee" of the Company under the Act at the time he failed to obtain a job.

We readily concede that, if "striking employees" indicate to their employer a desire to return to work and there are jobs unfilled *which they themselves left vacant by going on strike*, it is an unfair labor practice for the employer under such circumstances to discriminate in filling those vacancies.

National Labor Relations Board vs. *Mackay Radio and Telegraph Company*, supra.

We do contend, however, that at least where a strike is not occasioned by an unfair labor practice it was not the intention of Congress to place labor organizations in the unprecedented position of being permitted to "have their cake and eat it too". Where the employer is guilty of no unlawful act and labor sees fit to resort to direct action for the advancement of its economic position, it is, we submit, still required to risk the ultimate loss of employment which may result in the failure of such action. In the instant case the strike commenced prior to the effective date of the Act and was not occasioned by any unfair labor practice on the part of the Company. The strikers, protected by the Act against discrimination as long as they occupied the status of "employees" and protected by the Anti-Injunction Act against judicial interference with their legitimate efforts to win others over to their cause, fought and lost an economic battle. The Act recognizes the principle of majority rule. [Section 9(a).] Here a minority failed in an attempt to persuade the majority to join its ranks in attempting to force the Company to comply with a certain demand.* The Company was guilty of no wrong and as between it and the strikers, who voluntarily chose to risk their jobs in the hope of gain, surely the latter, not the former, should assume the loss of their own effort.

C. The discriminatory refusals to hire occurred after August 24, 1935, but from and after that date the persons who had previously been on strike were clearly not "employees" and no unfair labor practice was committed.

The Board found (R. 845) that "On August 24, 1935, the Union officially terminated the strike, and the picket line disbanded." The discriminatory refusals of employ-

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* This is only theoretically true, because no demand was made until August 9th, long after the strike had been lost. It is more logical to assume that the strike was originally called, although the record does not so show, as an incident to organizing and increasing the membership in the union.

ment all occurred after that date, but no one could conscientiously contend that after that date a strike was in progress or that a labor dispute was current or that any one of these individuals was an "employee" of the Company. From August 24, 1935, until the time of the hearing of this case before a Trial Examiner of the Board in January, 1938, the Company's payroll fluctuated considerably (R. 859). Men were hired and men were dropped. When the men involved in this case were refused employment because of their prior union activity, they received those refusals not as "employees" under the Act but as applicants for work. Their position was no different than that of the two men discussed in Paragraph I, who had left the employ of the Company prior to June 10, 1935. We submit that no unfair practice has been committed by the Company as to any one of them.

IV. The Board has no authority under Section 10(c) of the Act to order the reinstatement of persons who were discriminated against while occupying the status of "employees" as defined in Section 2(3), but who thereafter obtained "other regular and substantially equivalent employment" within the meaning of the latter provision, because such persons no longer occupy the status of "employees".

The mere statement of this proposition, in the light of the language of the Act, leaves little room for argument. Apparently the position of the Board is predicated entirely upon the provision of Section 10(c) whereby it is authorized to require an offending employer to take such action "as will effectuate the policies of this Act". If the Board's position were approved it would require complete disregard of the language chosen by Congress to express its intention. In this respect we submit for the Court's consideration the following language from a decision on the matter by the Circuit Court of Appeals for the Fourth Circuit in *Moores-*

ville Cotton Mills vs. *National Labor Relations Board*, 94 Fed. (2d) 61, 66 (1938):

> "When the definition of the term 'employee' in Section 2(3) to include any individual whose work has ceased as a consequence of a labor dispute 'and who has not obtained any other regular and substantially equivalent employment' is read in connection with the corrective power given to the Board in Section 10(c) to require employers who have been guilty of unfair labor practices 'to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act', it seems plain that the reinstatement of employees who have gotten other equivalent positions was not contemplated."

The Circuit Courts of Appeals for the Third and Ninth Circuits have reached the same conclusion.

National Labor Relations Board vs. *Botany Worsted Mills, Inc.*, 106 Fed. (2d) 263 (C. C. A. 3rd, 1939);

National Labor Relations Board vs. *Carlisle Lumber Co.*, 99 Fed. (2d) 533 (C. C. A. 9th, 1938).

The only decision to the contrary is that of the United States Circuit Court of Appeals for the Tenth Circuit in *Continental Oil Company* vs. *National Labor Relations Board*, 113 Fed. (2d) 473, cert. granted Oct. 28, 1940 (No. 413). That court in reaching such a decision predicated the same on its belief that the employee "has a legally protected tenure intermediate * * * his discrimination and his reinstatement", and that the Act "creates a legal right in the employee". We submit that such a position is untenable and that the correct view is that the reinstatement and back pay authorized by the Act are requirements imposed by the federal government to remedy a public wrong.

National Labor Relations Board vs. *Jones & Laughlin Steel Corporation*, supra;

Consolidated Edison Co. vs. *National Labor Relations Board*, 305 U. S. 197, 83 L. Ed. 127 (1938).

We find the following illuminating statement by the House Committee on Labor with respect to this particular provision of the Act:

> "No private right of action is contemplated. Essentially the unfair labor practices listed are matters of public concern, by their nature and consequences, present or potential; the proceeding is in the name of the Board, upon the Board's formal complaint." House Report No. 972, 74th Congress, 1st Session, p. 21.

V. Under Section 10(c) of the Act the Board's authority with respect to reinstatement and back pay is limited to "reinstatement of employees with or without back pay and the Board is not authorized to award back pay to persons as to whom it has no authority to order reinstatement.

With respect to the persons who have obtained other employment and as to whom the lower court refused to enforce the Board's order of reinstatement, the lower court did, however, approve so much of the order as awarded back pay to them up to the time when they obtained such other employment (R. 927). The Fourth Circuit in *Mooresville Cotton Mills* vs. *National Labor Relations Board*, supra, has said that such an order might be made because it "would not offend the terms of the act, would do justice to the workers and would tend to effectuate the policies of the act". This may well be so, but at the same time such an order violates the provisions of the Act. The Act says [Section 10(c)] that the Board may order "reinstatement of employees with or without back pay". While this language permits the Board to order reinstatement with or without back pay, it does not permit an award of back pay without reinstatement because the back pay provision is dependent upon the reinstatement provision.

> *National Labor Relations Board* vs. *Carlisle Lumber Company*, supra.

We agree with the reasoning of that court to the effect that since "reinstatement" and "back pay" were singled out for special treatment in Section 10(c), it was intended that the general words of that section concerning the effectuation of the policies of the Act were to be limited thereby.

VI. A person who has been the object of an unfair labor practice has the duty of exercising reasonable diligence to secure and retain other employment and the amount of back pay to which he might otherwise be entitled should be reduced by whatever amount he failed without excuse to earn.

Although the Board will no doubt contend that the ruling of the lower court in this respect will impose upon it an undue burden and will result in delay in the ultimate disposition of cases before it, we submit that the ruling is eminently fair to all concerned. This Court has held that the power of the Board to order affirmative action on the part of an offending employer is remedial, not punitive, in nature.

Consolidated Edison Co. vs. *National Labor Relations Board*, supra.

It is, therefore, very logical that an employer should not be forced to pay, and an employee should not be entitled to receive, any amount of back pay in excess of that which suffices to restore the status quo. To hold otherwise would be to encourage idleness. The courts have long since recognized the principle that it is the duty of the injured party reasonably to assert himself to prevent or diminish damages arising from the acts of the wrong doer.

3 *Sutherland on Damages* (3rd Ed.) 2087.

This principle has been universally applied to cases of wrongful discharge of an employee and has been adopted by this court.

Pierce vs. *Tenn. Coal & RR. Co.*, 173 U. S. 1, 43 L. Ed. 591 (1899);

Semet-Solvay Co. vs. *Wilcox*, 143 Fed. 839, 842, cert. den. 202 U. S. 617, 50 L. Ed. 1173 (C. C. A. 3rd, 1906);
Ransome Concrete Machinery Co. vs. *Moody*, 282 Fed. (2d) 9 (C. C. A. 2nd, 1922);
Alaska Fish & Lumber Co. v. *Chase*, 128 F. 886 (C. C. A. 9th, 1904);
Vol. 81, A. L. R. 282-284;
Vol. 39 C. J. 115-116;
Vol. 18 R. C. L. 527.

Although it is true that back pay under the Act does not constitute legal damages, and that no private right to the same is created in the employee (Argument IV, supra), there is a close analogy in determining under the Act the amount of back pay to which an employee is in good conscience entitled in order that he may be made whole and the effect of his employer's unfair practice obliterated. Surely it was not contemplated by Congress that an individual would be encouraged in refusing suitable employment or in failing to make a reasonable effort to occupy himself gainfully just because he had been the object of an unfair labor practice.

VII. Where the representatives of persons who claim to have been discriminated against delay for more than two years before filing charges and the Board thereafter takes an additional two and a half years to dispose of the case, an employer who has been helpless during that entire period of time to obtain a determination of his rights and obligations is entitled to judicial relief from an excessive award of back pay.

Five and one-half years have now elapsed since the events occurred which gave rise to this case. During four and one-half of those years the Company was powerless to speed a determination of its rights and obligations under the Act. During the first two of those years the extent to

which back pay might be permitted to accumulate against the Company was entirely within the control of the chosen representatives of the persons herein involved because nothing could be done toward the ultimate disposition of the case until charges were preferred against the Company by the men themselves. In the lower court the Company contended that it should be afforded judicial relief for the entire four and one-half year period, including two and a half years during which the Board failed to act. On further thought, however, that contention seems unsound because if these persons have been wronged in violation of the Act, there is no reason why they should be penalized for the delay on the part of those charged with the Act's administration. But that is not true of the period during which they themselves failed to use reasonable diligence in asserting their claims.

The Act places no limitation upon the time within which charges of unfair labor practices must be filed with the Board. Presumably, however, in enacting legislation of this character Congress sought to encourage the prompt disposition of labor disputes. Theoretically at least, back pay could be allowed to accumulate indefinitely, and this seems to be a logical instance where by analogy the doctrine of laches in equitable proceedings should be applied. If the Company is found to have been engaged in unfair labor practices, all of the elements required for the application of that doctrine are present:

1. The Company committed a wrong for which the persons affected had an administrative remedy;

2. These persons delayed unreasonably in seeking that remedy;

3. Until application for the remedy was made the Company had no way of knowing that a claim of unfair labor practices would be asserted. Until it acquired such knowledge the Company had no means of protecting itself from

possible severe monetary loss by offering reemployment to these persons if it saw fit to do so;

4. The Company was prejudiced by the delay in that it was lulled into allowing back pay to accumulate and it obligated itself to the employment of others whose jobs might have been occupied by the persons involved in this case.

Vol. 19, *American Jurisprudence*, 339, 342-343.

This Court has held the doctrine of laches applicable in cases where the government is only a nominal party.

U. S. vs. *Beebe*, 127 U. S. 338, 32 L. Ed. 121 (1888).

The Board has itself in several other cases recognized the unfairness of such a situation to an employer and has refused to award back pay for the periods during which there were unreasonable delays in filing charges.

Matter of Inland Lime & Stone Co., 8 N. L. R. B. 944;
Matter of Crowe Coal Co., 9 N. L. R. B. 1149;
Matter of L. C. Smith & Corona Typewriters, Inc., 11 N. L. R. B. 1382;
Matter of Phillips Petroleum Co., 24 N. L. R. B. No. 23, 6 L. R. R. 560, 561;
Matter of New York Times Co., 26 N. L. R. B. No. 112, 7 L. R. R. 32, 34;
Matter of Middle West Corp., 28 N. L. R. B. No. 84, 7 L. R. R. 405, 406.

In matter of *L. C. Smith & Corona Typewriters, Inc.*, supra, the Board in denying an award of back pay for the period of seventeen months between the unfair labor practice and the filing of charges, made the following statement:

> "However, since such delay would otherwise duly prejudice the respondent, and with a view to encouraging the prompt disposition of charges, we shall not award back pay * * * for the period in which

the Union failed to file its charges, in the absence of any showing of mitigating circumstances for this delay."

The Company submits that in the instant case it has been arbitrarily denied by the Board relief which the Board has consistently granted to others in similar circumstances, and that it is entitled to such relief by a decision of this Court. The Company should not be held responsible for any back pay which accumulated prior to December, 1937, when the charges with respect to the persons involved in this case were filed (R. 6-7, 47, Board's Exhibit #1-c).

Conclusion

In view of the record in this case and the propositions hereinabove set forth, we respectfully submit that the Board's order should be set aside in its entirety.

Respectfully submitted,

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APPENDIX

Statutory Provisions

NATIONAL LABOR RELATIONS ACT:

"SEC. 1. *Findings and declaration of policy.* The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest,

by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

"Sec. 2(3). The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse."

"Sec. 2(9). The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee."

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain

collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

"Sec. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *."

"Sec. 10(c). The testimony taken by such member, agent or agency of the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *"

"Sec. 13. Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike."

CONSTITUTION OF THE UNITED STATES:

Article V (Fifth Amendment). "No person shall be * * * deprived of life, liberty, or property, without due process of law; * * *."

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